92-1309

Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CHARLES McFERREN,
PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES McFERREN
REG-NO- 86045-024
P.O. BOX 1000
MILAN MICH 48160

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit committed reversible error by affirming the judgment of the United States District Court, entered without subject matter jurisdiction and based upon a violation of the Ex Post Facto Provision of the Constitution Of the United States?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.	3
OPINIONS BELOW.	4
STATEMENT OF JURISDICTION	5
CONSTITUTIONAL PROVISIONS INVOLVED. .	6
STATEMENT OF CASE	8
REASON'S FOR GRANTING REQUESTED RELIEF.	10
RELIEF REQUESTED.	13
APPENDIX.	14

TABLE OF AUTHORITIES
CASES

	Page
Godfrey v. Valentine, 39 Minn. 336, 40 N.W. 163 (1888). .	11
Porter v. Porter, 101 Ariz. 131, 416 P.2d 564 (1966), cert. denied 386 U.S. 957 (1967).	11
State ex rel. Peterson v. Dunlap, 28 Idaho 784, 156 P. 1141 (1916). .	11
Texas and Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, 270 U.S. 266 (1926). . . .	11

RULES

Federal Rule of Criminal Procedure 35.	10

OPINIONS BELOW

The February 18, 1992 and April 24, 1992 opinions of the Court of Appeals, whose judgment is herein sought to be reviewed, in Case No. 91-1202, which decisions are unpublished and are reprinted in the separate Appendix to this Petition, pp. 14-15. The prior opinions of the United States District Court for the Eastern District of Michigan, entered January 17, 1991 and January 23, 1991, in case no. 89-80515, which decisions are unpublished and are reprinted in the separate Appendix to this Petition, pp. 16-23.

STATEMENT OF JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were entered on February 18, 1992 and April 24, 1992. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved in this case is Article 1 Sec. 10 which reads as follows:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer, Ex Post Facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and

all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

STATEMENT OF CASE

On August 2, 1989, a Complaint was filed in the United States District Court for the Eastern District of Michigan, Southern Division, charging Charles McFerren and others with violations of 21 USC §§ 841(a), 843(b) and 846; 18 USC § 922(q); 18 USC § 924(c); and 26 USC § 7201.

On August 8, 1990, Petitioner plead guilty to three (3) counts of the Complaint.

On January 17, 1991, Petitioner was sentenced to a seven (7) year term of imprisonment. Further, on January 17, 1991, Petitioner was ordered to begin his sentence and was remanded by the Court to the custody of the Bureau of Prisons.

On January 22, 1991, upon the Court's own motion, Petitioner's original seven (7) year sentence was increased to twelve (12) years plus two (2) years special parole.

The District Court Order of Sentence was entered January 23, 1991.

On February 15, 1991, Petitioner filed a Claim of Appeal with the United States Court of Appeals for the Sixth Circuit.

On February 18, 1992, the United States Court of Appeals for the Sixth Circuit affirmed the January 23, 1991 Order of Sentence.

On March 30, 1992, Petitioner filed a Motion for Reconsideration of the February 18, 1992 Order.

On April 24, 1992, the United States Court of Appeals for the Sixth Circuit denied Petitioner's motion.

REASON'S FOR GRANTING REQUESTED RELIEF

The sole reason for granting the relief requested, is the District Court's lack of subject matter jurisdiction on January 22, 1991 to resentence the Petitioner. The Sixth Circuit Court of Appeals made a determination that the District Court had subject matter jurisdiction, authorized by Rule 35(c) of the Federal Rules of Criminal Procedure. However, Rule 35(c) was not enacted until December 1, 1991, fully ten (10) months following the resentencing of Petitioner. This is a clear violation of the Ex Post Facto provision of Article I, Section 10 of the United States Constitution. Further, Rule 35, as in effect on January 22, 1991, had no provision allowing the District Court to resentence the Petitioner.

A court has the power and duty to examine and to determine whether it has subject matter jurisdiction over causes

presented to it. Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, 270 U.S. 266 (1926).

In the case at bar, the District Court exercised subject matter jurisdiction based solely on the consent of the Petitioner. However, a party cannot by consent give a court subject matter jurisdiction over matters which it would not otherwise have. Thus, a judgment pronounced by said court is not validated by consent. Porter v. Porter, 101 Ariz. 131, 416 P.2d 564 (1966), cert. denied 386 U.S. 957 (1967); State ex rel. Peterson v. Dunlap, 28 Idaho 784, 156 P. 1141 (1916); Godfrey v. Valentine, 39 Minn. 336, 40 N.W. 163 (1888).

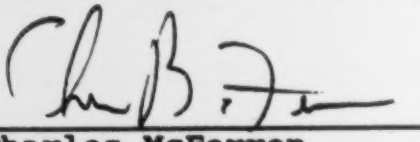
In the case at bar, Petitioner, with no apparent knowledge of the District Court's lack of subject matter jurisdiction, despite legal counsel, unknowingly waived a nonwaiveable jurisdictional defect. Thus, the January

23, 1991 Order of Sentence must be striken and the original sentence of seven (7) years be reinstated.

RELIEF REQUESTED

Wherefore, the Petitioner respectfully requests that this Honorable Court reverse the decisions of the Court of Appeals and reinstitute Petitioner's sentence in this matter as ordered by the District Court on January 17, 1991.

Respectfully submitted,



Charles McFerren
Reg. No. 86045-024
P.O. Box 1000
Milan, MI 48160

January 5, 1993

APPENDIX

Case No: 91-1202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHARLES MCFERREN

Defendant - Appellant

BEFORE: MERRITT, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

2/18/92

Leonard Green, Clerk

Case No: 91-1202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHARLES MCFERREN

Defendant - Appellant

This court has received a letter from the appellant which has been construed as a motion for reconsideration of the April 2, 1992 order denying his petition for rehearing as being untimely.

Upon consideration, it is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

4/24/92

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v. Criminal Action
No. 89-80515

CHARLES McFERREN,

Defendant.
_____/

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Thursday, January 17, 1991.

APPEARANCES:

MICHAEL LANG, Esq.
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226

Appearing on behalf of United States of America

DON FERRIS, Esq.
Suite 10
2004 Hogback
Ann Arbor, Michigan 48105

Appearing on behalf of Defendant Charles McFerren

Detroit, Michigan

Thursday, January 17, 1991

- - -

THE CLERK OF THE COURT: Docket No. 89-80515, United States of America v Charles McFerren.

MR. FERRIS: Don Ferris appearing on behalf and with Charles McFerren.

MR. LANG: Michael Lang on behalf of the Government, your Honor.

MR. FERRIS: Your Honor, we have read the pre-sentence report. We have no additions or corrections to the report.

I have filed a sentencing memorandum with the court, and I have nothing further to say other than what I have said in that memorandum.

I would ask the Court allow Mr. McFerren to report to the designated institution, and to be given 60 days from today's date to report to that institution.

THE COURT: Mr. McFerren, do you want to say anything?

DEFENDANT McFERREN: No, your Honor.

THE COURT: Mr. Lang?

MR. LANG: No, your Honor.

THE COURT: Mr. McFerren, it's the sentence of the Court that you be committed to the custody of the Attorney General on Count One for a term of seven years. That you be committed to the custody of the Attorney General on County Thirty-Two for a term of five years, consecutive to Count One. And that you be committed on County Thirty-Six to a term of 27 months, concurrent with Count One. That a $150.00 special assessment be imposed. And that you be remanded to the custody of the Marshal as of this time.

MR. FERRIS: Your Honor, may he have three weeks to get his property out of the home that is being forfeited to the United States Government?

THE COURT: No.

Mr. McFerren has had a long history of association with the criminal justice system. He should begin the renewal of that relationship forthwith, sir.

He is remanded to the custody of the Marshal.

DEFENDANT McFERREN: Your Honor --

THE COURT: I will hear nothing further, sir.

MR. LANG: Thank you, your Honor.

- - -

REPORTER'S CERTIFICATE

I, HERMAN H. TAPPERT, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and numbered cause on the date hereinabove set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

HERMAN H. TAPPERT
Official Court Reporter

Detroit, Michigan 48226

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v. Criminal Action
No. 89-80515

CHARLES McFERREN,

Defendant.
_____/

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count 1 - twelve (12) years under Section 4205(b)(1) plus two (2) years supervised release with condition that defendant participate in drug program, if

necessary, as directed by the Probation Department.

Count 32 - seven (7) months

Count 36 - five (5) years be DISMISSED.

IT IS ORDERED that Counts 3, 5, 6, 7, 8, 9, 10, 11, 12, 14-31, 37, 38, 39, 40, 41/ All sentences to run concurrent with each other.

Defendant is ordered to pay $50.00 Special Assessment on each Count for a TOTAL of $150.00.

IT IS FURTHER ORDERED defendant's bond be continued to FEBRUARY 13, 1991 at 12:00 noon at which time defendant is to surrender himself to the institution designated by the Attorney General.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at

any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

_____

AVERN COHN

DATE 01/23/91

U.S.
D
APR 16 1993

No. 92-1309

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES MCFERREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Ex Post Facto Clause barred the district court from resentencing petitioner five days after the initial sentence was imposed, where the original sentence structure did not conform to the terms of a plea agreement.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Beazell v. *Ohio*, 269 U.S. 167 (1925)	7
Collins v. *Youngblood*, 497 U.S. 37 (1990)	7
Lange, Ex parte, 85 U.S. (18 Wall.) 163 (1874)	7
United States v. *Carr*, 932 F.2d 67 (1st Cir.), cert. denied, 112 S. Ct. 112 (1991)	7
United States v. *Cook*, 890 F.2d 672 (4th Cir. 1989)	8
United States v. *Dieter*, 429 U.S. 6 (1976)	8
United States v. *DiFrancesco*, 449 U.S. 117 (1980)	6
United States v. *Greenwood*, 974 F.2d 1449 (5th Cir. 1992), petition for cert. pending, No. 92-7513 (filed Feb. 1, 1993)	8
United States v. *Henry*, 706 F.2d 298 (5th Cir. 1983)	9
United States v. *Himsel*, 951 F.2d 144 (7th Cir. 1991)	7
United States v. *Howard*, 902 F.2d 894 (11th Cir. 1990)	8, 9
United States v. *Lopez*, 706 F.2d 108 (2d Cir. 1983)	8
United States v. *Lundien*, 769 F.2d 981 (4th Cir. 1985), cert. denied, 474 U.S. 1064 (1986)	8
United States v. *Minor*, 846 F.2d 1184 (9th Cir. 1988)	8-9
United States v. *Rico*, 902 F.2d 1065 (2d Cir.), cert. denied, 498 U.S. 943 (1990)	8
United States v. *Smith*, 929 F.2d 1453 (10th Cir.), cert. denied, 112 S. Ct. 146 (1991)	8
United States v. *Strozier*, 940 F.2d 985 (6th Cir. 1991)	5, 8
United States v. *Uccio*, 917 F.2d 80 (2d Cir. 1990)	8

Constitution, statutes and rules: Page

U.S. Const.:
Art. I:
§ 9, Cl. 3 (Ex Post Facto Clause) 6, 7
§ 10, Cl. 1 (Ex Post Facto Clause) 7
Amend. V (Double Jeopardy Clause) 5, 6
18 U.S.C. 922(g) 2, 4
18 U.S.C. 924(c) 4
18 U.S.C. 4205(b)(1) 2
21 U.S.C. 846 2
26 U.S.C. 7201 2
Fed. R. Crim. P.:
Rule 35 5
Rule 35(a) 5
Rule 35(c) 5, 6, 7
Sentencing Guidelines § 5K1.1 9

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1309

CHARLES MCFERREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. App. 14) is unreported but is noted at 955 F.2d 45 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. A petition for rehearing was denied on April 2, 1992, for lack of timeliness. On April 24, 1992, the court of appeals denied a motion to reconsider the order denying the petition for rehearing. The petition for a writ of certiorari was filed on June 17, 1992, and is therefore untimely under Rule 13.1 and Rule 13.4 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and six co-defendants were charged with violations of federal drug, firearms, and tax laws in a 41-count indictment filed in the United States District Court for the Eastern District of Michigan. Petitioner was named in 35 of the counts. Pet. C.A. Br. 1.

Pursuant to a plea agreement, petitioner pleaded guilty to three counts of the indictment: Count 1 (conspiracy to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 846), Count 32 (possession of firearms by a convicted felon, in violation of 18 U.S.C. 922(g)), and Count 36 (income tax evasion, in violation of 26 U.S.C. 7201). In exchange for the guilty pleas, the plea agreement provided that the remaining counts would be dismissed, the term of imprisonment would not exceed 12 years, and the sentences on each count would run concurrently. The crimes charged in Counts 1 and 36 occurred prior to the effective date of the Sentencing Guidelines (November 1, 1987), and petitioner was to be sentenced on those counts under the parole provisions of 18 U.S.C. 4205(b)(1). The crime charged in Count 32, however, occurred after the effective date of the Guidelines, and petitioner was accordingly to be sentenced on that count under the Guidelines. The Guidelines range for that offense was 21-27 months' imprisonment. The court accepted the plea agreement. Gov't C.A. Br. 2-3.

Petitioner initially appeared for sentencing on January 17, 1991. The judge sentenced him to consecutive terms of imprisonment of seven years on Count 1 and five years on Count 32, and a concurrent 27-month prison term on Count 36. Although the

total 12-year sentence was in accord with the plea agreement, the sentence did not comport with the agreement in all respects, because the terms of imprisonment were not all concurrent. In addition, the court apparently erred in transposing the sentences for Counts 32 and 36 by imposing a five-year sentence on Count 32, which should have been a Guidelines sentence in the 27-36 month range, and imposing a 27-month sentence on Count 36, for which the maximum penalty was five years. Finally, the court neglected to impose the 2-3 year term of supervised release required under the Guidelines. Petitioner was ordered to begin serving the sentence without delay. Pet. C.A. Br. 1-2; Gov't C.A. Br. 3-4.

Almost immediately after sentence was imposed, Assistant United States Attorney Michael Lang realized that it was erroneous. He notified the judge and defense counsel, and a resentencing was scheduled for January 22, 1991, the earliest available date. Gov't C.A. Br. 4.

At the hearing on January 22, the judge stated that he had erred in the way he had structured the sentence. Defense counsel initially argued that the judge had no authority to increase the length of the sentence on Counts 1 and 36, and that the five-year term imposed on Count 32 was illegal because it constituted an unexplained upward departure from the Sentencing Guidelines level. The judge explained to counsel that he had intended to impose a 12-year prison term and had ordered consecutive terms to reach that result because he had believed that Count

32 charged a pre-Guidelines offense for which a five-year consecutive term had to be imposed.[1]

The judge then gave petitioner an opportunity to discuss the alternatives with his lawyer, including resentencing or permitting the original sentence to stand pending collateral attack, if any, by petitioner. The following then ensued:

> MR. FERRIS: I have explained to Mr. McFerren the ramifications, and he wants to proceed to re-sentence, is what he tells me.
>
> THE COURT: So you are satisfied that we are, as if I had never sentenced him before. That's where we are now. That the prior proceeding is simply wiped out, and that he's before the Court for sentencing.
>
> MR. FERRIS: Is that what you want to do, Mr. McFerren?
>
> DEFENDANT McFERREN: Yes, sir.

Resent. Tr. 8. The judge then sentenced petitioner to concurrent terms of imprisonment of 12 years on Count 1, 27 months on Count 32, and 5 years on Count 36.[2] Resent. Tr. 9-10.

---

[1] The judge apparently believed that Count 32 charged petitioner with carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c), which would have required imposition of a five-year consecutive sentence. In fact, Count 32 charged petitioner with being a felon in possession of firearm, in violation of 18 U.S.C. 922(g), which did not require a consecutive sentence and which was subject to the Guidelines.

[2] The judge also ordered petitioner to serve two years of supervised release. Resent. Tr. 9. Petitioner does not specifically attack the addition of the supervised release term on

2. On appeal, petitioner argued that the district court had no authority to resentence him, but that the court of appeals should vacate the five-year sentence originally imposed on Count 32 because it constituted an unexplained upward departure from the 27-36 month Guidelines range for that offense. Petitioner claimed that the pre-Guidelines version of Fed. R. Crim. P. 35 (which governed sentencing on Counts 1 and 36) did not give the district court authority to increase the sentence on Count 1 from 7 to 12 years' imprisonment and on Count 37 from 27 months' to 5 years' imprisonment, and that the Double Jeopardy Clause prohibited the increases. The pre-Guidelines Rule 35(a) provided that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." According to petitioner, the sentences originally imposed on Counts 1 and 36 were not "illegal" or "imposed in an illegal manner" because the terms of imprisonment specified were within the statutory maximums. In an unpublished order, the court of appeals affirmed the sentences imposed at the January 22 resentencing. Pet. App. 14.

ARGUMENT

Petitioner argues that the district court's exercise of jurisdiction to resentence him constituted a retroactive application of Rule 35(c),[3] in violation of

---

resentencing. See *United States* v. *Strozier*, 940 F.2d 985, 986-988 (6th Cir. 1991).

[3] Rule 35(c), which took effect on December 1, 1991, provides that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was

the Ex Post Facto Clause of the Constitution, Art. I, § 9, Cl. 3. Pet. 10. He also argues that the district court had no subject matter jurisdiction at the time of resentencing and that he unknowingly waived what he terms a "nonwaiveable jurisdictional defect." Pet. 11.

1. Initially, petitioner errs in his assertion (Pet. 10) that the court of appeals determined that the sentencing judge's exercise of jurisdiction at the time of resentencing was founded upon Rule 35(c). The Sixth Circuit's one-page, two-paragraph opinion does not mention that Rule. Nor did the government's brief in the court of appeals. Instead, the government's brief argued that petitioner had waived any objection to his resentencing, Gov't C.A. Br. 7-8, and that a court has inherent authority, consistent with the Double Jeopardy Clause, to correct a defect in sentencing before the defendant has acquired a reasonable expectation of finality in his sentence, Gov't C.A. Br. 9-16. See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980). The government specifically stated that "Rule 35 is inapplicable to this case." Gov't C.A. Br. 11 n.3.

Even if Rule 35(c) had been invoked to justify petitioner's resentencing, there would have been no violation of the Ex Post Facto Clause. The Ex Post Facto Clause prohibits

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense

---

imposed as a result of arithmetical, technical, or other clear error."

> available according to law at the time when the act was committed.

Beazell v. *Ohio*, 269 U.S. 167, 169-170 (1925); see *Collins* v. *Youngblood*, 497 U.S. 37, 42-43, 52 (1990).[4] It does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell*, 269 U.S. at 171; see *Collins*, 497 U.S. at 46. Rule 35(c) does not alter the definition of a crime, the prescribed punishment for a crime, or any defense available in a criminal prosecution. It simply codifies a procedural device recognized by prior practice, in accordance with which a district court could correct an erroneous sentence. Cf. *United States* v. *Himsel*, 951 F.2d 144, 146-147 (7th Cir. 1991); *United States* v. *Carr*, 932 F.2d 67, 71 n.5 (1st Cir.), cert. denied, 112 S. Ct. 112 (1991). Accordingly, applying the new Rule 35(c) to petitioner's resentencing would not have violated the Ex Post Facto Clause.

2. Contrary to petitioner's contention, the sentencing judge did not exercise jurisdiction over petitioner at resentencing solely because he consented. The general power of a court over its own civil and criminal judgments has long been acknowledged to extend beyond the time the judgment is entered or service of the sentence is commenced. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 167 (1874). District

[4] *Beazell* and *Collins* did not involve the Ex Post Facto Clause applicable to the federal government; instead, they involved the parallel Ex Post Facto Clause applicable to the States, Art. I, § 10, Cl. 1. The two clauses, however, have always been interpreted to embody identical substantive standards.

courts may act "promptly to correct their own alleged errors," to avoid "imposing added and unnecessary burdens on the courts of appeals." *United States* v. *Dieter*, 429 U.S. 6, 8 (1976). Accordingly, there is no doubt that the district court had jurisdiction to resentence petitioner, and petitioner's consent simply waived any objection he might have asserted to nonjurisdictional defects in the resentencing.

In *United States* v. *Cook*, 890 F.2d 672, 674-675 (4th Cir. 1989), the court of appeals recognized that a district court has inherent power to correct an acknowledged and obvious mistake, at least as long as the defendant has no reasonable expectation of finality. The Fourth Circuit limited the period of non-finality to the time within which either party could file a notice of appeal. *Id.* at 675. In *United States* v. *Rico*, 902 F.2d 1065, 1067-1068 (2d Cir.), cert. denied, 498 U.S. 943 (1990), in circumstances remarkably similar to those of this case, the court agreed with *Cook* that a sentence that deviated from a plea agreement could be adjusted by the trial judge sua sponte within the period allowable for filing a notice of appeal. Accord *United States* v. *Strozier*, 940 F.2d 985 (6th Cir. 1991); *United States* v. *Smith*, 929 F.2d 1453, 1457 (10th Cir.), cert. denied, 112 S. Ct. 146 (1991); *United States* v. *Uccio*, 917 F.2d 80, 84 (2d Cir. 1990); *United States* v. *Lundien*, 769 F.2d 981 (4th Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Lopez*, 706 F.2d 108 (2d Cir. 1983); cf. *United States* v. *Greenwood*, 974 F.2d 1449, 1470 (5th Cir. 1992), petition for cert. pending, No. 92-7513 (filed Feb. 1, 1993).

United States v. *Howard*, 902 F.2d 894, 897 (11th Cir. 1990), *United States* v. *Minor*, 846 F.2d 1184, 1187

(9th Cir. 1988), and *United States* v. *Henry*, 709 F.2d 298 (5th Cir. 1983) (en banc), are not to the contrary, since none of those cases concerned a trial court's authority to correct its own errors before the defendant obtained a reasonable expectation of finality in the sentence. In *Henry*, a trial court attempted to resentence a defendant five years after the sentence was originally imposed, see 709 F.2d at 301-302, and in *Minor*, the trial court attempted to increase a valid sentence four years after it had been imposed because convictions (and sentences) on related counts had been overturned on appeal, see 846 F.2d at 1185-1186. *Howard* involved a district court's attempt to impose a sentence on a defendant under the Guidelines while reserving decision indefinitely on the government's motion under Sentencing Guidelines § 5K1.1 to depart downward because the defendant had provided substantial assistance in the investigation or prosecution of others. The Eleventh Circuit held that to permit a district court to reserve decision in that manner would be to give it indefinite authority to resentence a defendant whenever it chose to rule on the § 5K1.1 motion. The decision in *Howard* thus has no bearing on the jurisdictional issue raised here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MERVYN HAMBURG
Attorney

APRIL 1993